

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 18TH OCTOBER 2007 / 26TH ASWINA 1929

SA.No. 414 of 1994()

AS.260/1992 of PRL.S.C.,THALASSERY
OS.436/1987 of PRL.M.C.,KANNUR
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APPELLANT/RESPONDENT/DEFENDANT:

KELOTH KUZHUKUNNONVEETIL BALAKRISHNAN NAMBIAR,
@ KUNHIKRISHNAN,
ALAKKAT HOUSE, KOODALI AMSOM,
POOVATHOOR DESOM, KANNUR

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENTS/APPELLANTS/PLAINTIFFS:

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1. ORAVIL CHANDROTH KARTHIYAYINI AMMA,
W/O.A.K.GOPALAN NAMBIAR, INDU NIVAS,
P.O.KOODALI, KAVUMTHAZHE, KANNUR
 2. INDULEKHA.O. (MINOR) 17 YEARS -DO-
 3. PUSHPALEKHA.O. (MINOR) 15 YEARS -DO-
 4. INDULAL.O. (MINOR) 8 YEARS -DO-

(RESPONDENTS 2 TO 4 ARE MINORS REPRESENTED BY GUARDIAN MOTHER
1ST RESPONDENT KARTHIYAYINI AMMA)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 18/10/2007 ALONG WITH SA NO. 442 OF 1994 THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON .C.M.PNO.791/94 IN S.A.414/94

DISMISSED

18/10/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 414/94 & 442/94

Dated 18th October 2007

J U D G M E N T

Appellant is defendant in O.S.436/1987 and first plaintiff in O.S.459/1987 before Munsiff court, Kannur. Second plaintiff is his father, who died subsequently and appellant was recorded as his legal heir. Respondents in S.A.414/1994 are plaintiffs in O.S.436/1987. Respondent in S.A.442/1994 is the sole defendant in O.S.459/1987 the first plaintiff in O.S.436 of 1987. Respondents 2 to 4 in S.A.414/1994 are children of first respondent. Both suits were for injunction. Appellant instituted O.S.459/1987 along with his father seeking a decree for permanent prohibitory injunction restraining first respondent from trespassing into plaint schedule property contending that her property is lying to south of plaint schedule property and respondent is not in possession of the property and her property is in survey No.8/3 of Koodali village. Respondents filed O.S.436/1987 contending that they are in possession of

the plaint schedule property and appellant attempted to trespass into the plaint schedule property. Plaint schedule property in O.S.436/1987 is in R.S.No.8/3A of Koodali village. Dispute between the parties is with regard to a narrow strip of land which lies in between the admitted properties of both parties. According to appellant the said property forms part of the property obtained by her under Ext.B1 and it is in R.S.No.7/3 and respondents have no right over the same. According to respondents the disputed property belongs to them under Ext.A1 partition deed and it is in R.S.No.8/3A and appellant has no right or possession over the same. Both suits were jointly tried. Learned Munsiff granted a decree in O.S.436/1987 and dismissed O.S.459/1987. It was challenged before Sub court, Thalassery in A.S.111/1990 and 112/1990. Learned Sub Judge on re-appreciation of evidence found that the dispute is with regard to the same property over which appellant is claiming right as part of R.S.No.7/3 and respondents are claiming right as part of R.S.No.8/3A and Exts.C2 to C6 cannot be relied on to fix identity. Learned Sub Judge set aside Exts.C2 to C6 and remanded the suits to the trial court for fresh disposal

directing the trial court to appoint a fresh commission to measure and demarcate the property of both first respondent and appellant under Exts.A1 and B1. Thereafter learned Munsiff appointed another commission who submitted Ext.C7 report and C8 plan. As per Exts.C7 and C8 the disputed portion is having an extent of 1 cent and it falls in R.S.No.7/3 and not in R.S.No.8/3A. Learned Munsiff thereafter dismissed both suits holding that property as demarcated by the Commissioner is not correct and properties were not as shown in the plaint and therefore both appellant and respondents are not entitled to the injunction sought for. It was challenged before Sub court, Thalassery in A.S.260/1992, an appeal filed by respondent herein and A.S.83/1993 an appeal filed by appellant herein. Learned Sub Judge as per the impugned judgment, on re-appreciation of evidence found that though title to the disputed property vests with appellant, as it is part of R.S.No.7/3 and first respondent has title only to the property in R.S.No.8/3A, found that question of title is not relevant as the suits are only for injunction. Learned Sub Judge also found that the disputed portion lies in a lower level than the

property of appellant and even in the plaint in O.S.459/1987 appellant admitted that demarcating his property and property of respondents there is a mud wall which separates the properties and Ext.C1 report shows that the said mud wall is not on the survey boundary shown in Ext.C8 but further towards north through northern boundary of the disputed property. Learned Sub Judge also found that there are 15 areca trees of the same age in the disputed property and 3 areca trees in the southern property which admittedly is in the possession of respondents. On the evidence of Pws.2 and 3 it was found that the disputed portion of the property is in the possession of respondents. Therefore, a decree for permanent prohibitory injunction was granted in O.S.436/1987 and A.S.260/1992 was allowed. Confirming the dismissal of O.S.459/1987, A.S.83/1993 was dismissed. These appeals are filed challenging the said common judgment. S.A.414/1994 is filed challenging the decree granted in favour of respondents in A.S.260/1992. S.A.442/1994 was filed challenging the concurrent dismissal of A.S.83/1993.

2. Appeals were admitted formulating following

substantial questions of law.

1) When it is found that the disputed property is part of R.S.No.7/3, which is that of the appellant, whether first appellate court was justified in granting a decree for injunction in favour of respondent.

2) When properties are surveyed and demarcated, can an owner of a surveyed property claim right over a property outside the survey number, otherwise than by filing a suit as provided under Section 14 of Kerala Survey and Boundaries Act.

3) Whether first appellate court erred in finding title in a suit for injunction simpliciter, where court fee was paid only under Section 27(c) of Court Fees and Suit Valuation Act.

3. Learned counsel appearing for appellant and respondents were heard. Argument of learned counsel appearing for appellant is that when respondents claim right and title over the property in R.S.No.8/3A alone and it is found that the disputed property is in R.S.No.7/3, which belongs to appellant, first appellate court should not have granted a decree for injunction

against appellant. It was argued that on the evidence it should have been found that the disputed property, which forms part of R.S.No.7/3, belong to and in the position of appellant which is being enjoyed as part of the remaining property in R.S.No.7/3 and in such circumstances, a decree for injunction should not have been granted. Learned counsel also argued that as per Ext.C7 report, age of areca trees in the disputed property is 40 years and therefore first appellate court should have found that it forms part of the property of appellant. Learned counsel also argued that though the disputed property is in R.S.No.7/3 and property obtained by respondent is in R.S.No.8/3A, evidence prove that disputed portion is on a lower level and is of the same level with the remaining property in R.S.No.8/3A and age of the improvements in the disputed property and the remaining property in the possession of respondents is same and on the evidence first appellate court rightly granted the decree.

4. It is true that under Ext.A1, the property obtained by first respondent is in R.S.No.8/3A and under Ext.B1 property belonging to appellant is in R.S.No.7/3. But being a suit for injunction the

question is only with regard to the possession of the disputed property. Though learned Sub Judge found that being part of R.S.No.7/3, respondents cannot claim title to the disputed property as it forms part of the property belonging to appellant, being a suit for injunction, if respondents could establish their possession over the disputed property, a decree for injunction could be granted. Though no issue was framed on the question of title, in the light of contentions raised by parties, first appellate court found that the disputed property forms part of R.S.No.7/3 and therefore it forms part of the property of appellant. I do not find why appellant is challenging that finding as it is in favour of appellant. Whatever it be, as the suit is only for injunction, unless appellant establishes his possession over the disputed property, he is not entitled to a decree for injunction. Similarly, when respondents established their possession of the disputed property, they are entitled to the decree for injunction.

4. It is on the basis of appreciation of evidence first appellate court entered a factual finding that the disputed property, though forms part

of R.S.No.7/3 is in the possession of respondents. Learned Sub Judge relied on several aspects to come to that conclusion. Plaintiff in O.S.459/1987 specifically pleaded that a mud wall separates the property of appellant and respondents. Ext.C7 report with Ext.C8 plan establishes that there exist a mud wall but it is not on survey boundary line which separates R.S.No.7/3 and 8/3A, but further to the north of the survey boundary line which is the northern boundary of the disputed property. It is on that basis learned Sub Judge found that the property in the possession of appellant could only be to the north of that mud wall. If so, the disputed property could not be in the possession of appellant. Added to this, on the evidence it was found that the disputed property is lying in a lower level and there are 15 areca trees aged 40 years in the disputed property and in the property which lies to the south of said property, in R.S.No.8/3A which is admittedly in the possession of respondents, also there are 3 areca trees of the same age. Learned Sub Judge also found that to the east of the property in R.S.No.8/3 A, there is a portion where also areca trees of similar age and is also in the

possession of respondents. It is on that basis learned Sub Judge found that disputed property along with those properties are in the possession of the respondents. Added to this, learned Sub Judge also relied on the oral evidence of Pws.2 and 3. In such circumstances, I find no reason to interfere with the factual finding. Even though disputed property forms part of R.S.No.7/3, belonging to appellant as it is in the possession of respondents they are entitled to the decree granted. In such circumstances, there is no merit in the appeals. The appeals are dismissed. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.414/94 & 442/94

18th October 2007

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